

REMARKS

I. Summary of the Examiner's Action

A. Claim Rejections

At page 2, lines 10 – 12 of the Office Action, the Examiner rejected claim 28 under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

At page 2, line 23 – page 3, line 2 of the Office Action, the Examiner rejected claims 1 – 11, 23, 26 – 29 under 35 U.S.C. § 103(a) as being unpatentable over United States Patent No. 6,240,460 B1 issued to Mitsutake *et al.* (hereinafter “the Mitsutake patent”) in view of United States Patent No. 5,890,134 issued to Fox (hereinafter “the Fox patent”) and further in view of United States Patent No. 5,907,556 issued to Hisanaga *et al.* (hereinafter “the Hisanaga patent”).

At page 8, lines 9 – 12 of the Office Action, the Examiner rejected claims 12 – 17 and 25 under 35 U.S.C. 103(a) as being unpatentable over the Mitsutake patent in view of the Fox and Hisanaga patents, and further in view of United States Patent No. 5,819,094 to Sato *et al.* (hereinafter “the Sato patent”).

At page 10, lines 4 – 7 of the Office Action, the Examiner rejected claims 18 - 19 under 35 U.S.C. 103(a) as being unpatentable over the Mitsutake patent in view of the

Fox and Hisanaga patents, and further in view of United States Patent No. 6,502,062 B1 to Acharya *et al.* (hereinafter “the Acharya patent”).

At page 10, lines 9 – 13 of the Office Action, the Examiner rejected claims 20 – 21 under 35 U.S.C. 103(a) as being unpatentable over the Mitsutake patent in view of the Fox and Hisanaga patents, and further in view of the Acharya and Sato patents.

On page 12, lines 13 – 16 of the Office Action, the Examiner rejected claims 22 and 24 under 35 U.S.C. 103(a) as being unpatentable over the Mitsutake patent in view of the Fox and Hisanaga patents, and further in view of United States Patent No. 5,581,369 to Righter *et al.* (hereinafter “the Righter patent”).

These rejections are respectfully disagreed with, and are traversed below.

II. Applicants’ Response – Claim Rejections

A. Rejection of Claim 28 under 35 U.S.C. § 112, second paragraph

Applicants have amended claim 28 thereby overcoming the Examiner’s rejection. Nonetheless, Applicants respectfully submit that as originally presented the claim was definite, and particularly pointed out and distinctly claimed the subject which Applicants regarded as their invention. Surely Examiner does not believe that the inadvertent substitution of “the” for “an” makes the claim indefinite. Accordingly, Applicants

respectfully submit that this amendment was made solely to comply with formal requirements regarding claim drafting and not for purposes of patentability.

B. Rejection of Claims 1 – 11, 23 and 27 – 29
under 35 U.S.C. § 103(a)

Applicants respectfully submit that the Examiner has not overcome the arguments set forth in Applicants' Response dated July 30, 2004 (hereinafter "the July 30, 2004 response"). In summary, Applicants repeat that the Examiner apparently selected references based on a Boolean keyword search without reference to what the references actually teach. By formulating rejections in such a manner, the Examiner has effectively shifted the responsibility to Applicants in the first instance. Applicants remind the Examiner that it is the Examiner's responsibility to set forth a prima facie case of obviousness based on a thorough understanding of the references and a reasoned application of them.

The Examiner's citation of some case law does not change the proper outcome since the facts of the present situation do not match those of the cases being cited. For example, at page 14 of the Office Action, the Examiner states that

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge

gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443F.2d 1392, 170 USPQ 209 (CCPA 1971).

Applicants respectfully submit that this in no way responds to the points made in Applicants' response filed on July 30, 2004. In that response, the Applicants' duly noted that before combining references, the Examiner combined subject matter disclosed in the Mitsutake patent in a way not taught by the Mitsutake patent. See July 30, 2004 response, page 11, lines 10 – 18.

Applicants respectfully note that the Examiner in no way challenged Applicants' characterizations of the portions of the Mitsutake patent, or the Examiner's actions in combining them. In situations such as this where the Examiner is picking and choosing disparate parts of a reference even before a combination is made with subject matter disclosed in other references, one can only conclude that the Examiner is effectively, and improperly, using the Applicants' own teaching as a blueprint to make a combination nowhere taught in the base reference, or in any of the other relied-upon references.

Continuing with respect to the Fox patent, Applicants respectfully submit that the Examiner has not given Applicants' arguments a fair hearing by reconsidering the Fox patent in view of the Applicants' arguments; instead, the Examiner repeated his arguments and, in the manner of the application of the Mitsutake patent, added citation to case law that is factually distinguishable and therefore inapplicable.

In the July 30, 2004 response the Applicants noted that the Fox reference apparently concerns the optimization of schedules used in complex construction projects and has nothing to do with the handling of scheduling problems encountered in data transmission networks. In view of this, Applicants respectfully requested that the Examiner identify with particularity those portions of the Fox reference that describe or suggest either that its teachings are generally applicable to all scheduling problems or that they are specifically applicable to scheduling problems encountered in data transmission networks.

Further, Applicants observed that in applying relied-upon portions of the Fox patent the Examiner was paraphrasing them and reading into them subject matter that appeared nowhere in the Fox patent. Applicants direct the Examiner's attention to pages 14 – 16 of the July 30, 2004 response. The purported paraphrase of the portion of the Fox patent appearing at Column 3, lines 34 – 46, provided at page 5, lines 3 – 10 of the May 10, 2004 office action simply bears no resemblance whatsoever to the actual portion of the Fox patent.

The Examiner in the December 30, 2004 Office Action effectively ignored Applicants' arguments and cited case law that is factually distinguishable and refined somewhat the basis upon which the combination of Mitsutake and Fox was made. The purported basis for combining the Fox and Mitsutake patents is reproduced here:

This invention relates to a computerized scheduler and, more particularly, to an improved method or algorithm for efficiently defining

and/or optimizing the performance schedule of the multiple tasks necessary to the accomplishment of a project, particularly a manufacturing project, taking both resource and precedence constraints into account.

Fox patent, column 1, lines 4 – 9. Examiner apparently suggests that this generic statement concerning the optimization of project schedules provides the basis for combining the Mitsutake and Fox patents. Applicants respectfully submit that this portion of the Fox patent makes no suggestion to combine the references in such a way so that methods for handling scheduling problems encountered in data transmission over a network are created.

This conclusion naturally follows from the meaning assigned to a word that appears prominently in the portion of the Fox patent appearing at column 1, lines 4 – 9 relied upon by the Examiner: *project*. Immediately after the portion cited by the Examiner, the Fox patent defines what is meant by *project*:

It is well recognized that the construction of any building, machine or equipment, generally referred to as a *project*, requires the collective performance of a number of individual operations or tasks for successful completion.

Fox patent, Column 1, lines 13 – 16 (emphasis added). Applicants respectfully submit that when the portion of the Fox patent occurring at column 1, lines 4 – 9 is read in light of the portion occurring immediately thereafter at lines 13 – 16, one of ordinary skill in the art would not conclude that the schedule optimization methods disclosed in the Fox patent are either generally applicable, or specifically applicable to scheduling problems

encountered in data transmission over networks. Rather, one of ordinary skill in the art would understand that the methods disclosed in the Fox patent only concern the optimization of schedules used in complex construction projects.

The Examiner relies upon the following citation to case law to buttress the rejection:

In response to applicant's argument that Fox is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, Fox is analogous art because Fox teaches optimizing the performance schedule of multiple task necessary to accomplish a project which can be applied to Mitsutake.

December 30, 2004 Office Action, page 14, lines 15 – 21. Applying the Examiner's own citation to case law to the instant facts, on its face the Fox patent is not in the field of Applicant's endeavor since it has nothing to do with solving scheduling problems encountered in data transmission networks. Examiner cannot ignore the definition for project provided in Fox, which encompasses only scheduling problems encountered in complex construction or manufacturing situations. Further, there is no teaching whatsoever that the methods disclosed in the Fox patent may be applied successfully to scheduling problems encountered outside the project management field. In view of this,

Applicants respectfully submit that it is improper to combine the Fox and Mitsutake patents.

For the foregoing reasons, Applicants respectfully submit that claim 1 is patentable over the references of record. Applicants respectfully request that the rejection of claim 1, and independent claims 23 and 26 – 27 which were rejected on grounds similar to claim 1, be withdrawn.

Applicants also submit that since claim 1 is patentable, all of the claims which depend from claim 1 are likewise patentable. Applicants nonetheless submit the following remarks providing additional support for the patentability of claims depending from claim 1.

Regarding claim 9, Applicants respectfully note that the Examiner has not responded to Applicants' arguments set forth in the July 30, 2004 Response other than by repeating the rejection. Applicants respectfully request that the Examiner respond to Applicants' arguments and further identify with particularity where the subject matter of claim 9 is found within the portion of the Mitsutake patent relied on.

The same reasoning applied to the impropriety of the rejection of claim 9 similarly applies to the rejection of claims 10 and 11. Applicants respectfully request that

the Examiner respond to Applicants' arguments and identify with particularity where the subject matter of claims 10 and 11 is found in the cited references.

For all of the foregoing reasons, Applicants respectfully request that the Examiner withdraw the rejection of claims 1 – 11, 23, and 26 – 29.

B. Rejection of Claims 12 – 17 and 25 under 35 U.S.C. § 103(a)

Applicants respectfully note that the Examiner ignored Applicants' request that Examiner identify with particularity where in the Sato patent there is a description or suggestion that its teachings regarding the logging of errors as a computer program executes is applicable to data transmission over a network. The Examiner, nonetheless, did identify a portion of the Sato patent as providing a basis for combining the teachings of the Sato patent with those of the Mitsutake, Fox and Hisanaga patents, reproduced here:

Taking the above into consideration, a first object of the present invention is to provide an apparatus for log data collection . . .

Sato patent, Column 2, lines 15 – 16. This would lead one to believe that the Sato patent generally concerns the logging of errors in any context.

This is not the case, however; the Examiner has only cited half of the sentence in which this statement occurred and therefore has misrepresented the teaching of the Sato patent. Applicants remind the Examiner that a partial citation to a section of a patent in an

effort to avoid the totality of its teachings is called “taking something out of context” and has no place in the present exercise since this not a true adversarial proceeding. The complete sentence is reproduced here:

Taking the above into consideration, a first object of the present invention is to provide an apparatus for log data collection and analysis that can utilize the part-to-part association between a source program and a history diagram indicative of the program operations.

Sato patent, Column 2, lines 15 – 19. Applicants also note that three additional objects are set forth in the Sato patent following the portion occurring at Column 2, lines 15 – 19 reproduced above and none of them have to do with generally applying error logging outside of computer program execution or specifically to data transmission over a network.

Accordingly, Applicants respectfully submit that it is improper to combine the teachings of the Sato patent with those of the Mitsutake, Fox and Hisanaga patents.

Regarding specific rejections, Applicants note that the use of “time stamp” in the Sato patent has nothing to do with use of a time stamp in a data dispatch process occurring over a network as in the case of claim 12:

The time stamp information field 21 records the time when the process enters and leaves each function that is called in the object program, which is the time measured from the start time of the program execution.

Sato patent, Column 5, lines 59 – 62. If the Examiner persists in the rejection of claim 12, Applicants respectfully requests that the Examiner explain how the reproduced portion of the Sato patent relates to the subject matter of claim 12 which has nothing whatsoever to do with tracking errors occurring as a program executes.

Claim 13 recites, in part, “a network dispatcher . . . where the quantity completion measure is one or more statistics of the history log.” Since claim 13 concerns a “quantity completion measure” which refers to the amount of data actually transmitted, it is not seen where reference is made to “a quantity completion measure” in Sato at column 2, lines 36 – 42. Sato simply does not concern a network dispatcher performing a data transmission process.

Regarding claims 14 and 15, the Examiner states that

Applicant argues as per claim 14, 15 that Sato does not teach a network dispatcher. Mitsutake teaches this limitation in claim 1.

Applicants submit that the Examiner is now misrepresenting Applicants’ own response! The Applicants referred to operations performed by a process of a network dispatcher and that those operations were neither described nor suggested by the portion of the Sato patent relied upon by the Examiner. To clarify an already-clear situation, Claim 14 recites, in part, “a network dispatcher . . . where the statistics include any one or more of the following: an average amount written and a change in amount written” (emphasis added). Column 2, lines 43 – 46 of Sato relied upon by the Examiner states that the “log

data collecting means collects log records while the program is in execution, where each log record includes information regarding an operation type and execution time of each part of the program” and has nothing whatsoever to do with the emphasized portion of claim 14.

Regarding the rejection of claim 16, the Examiner continues to selectively crop the subject matter of the Sato patent in an effort to misrepresent its teaching.

Applicants respectfully submit that since claim 17 depends on a base claim which is patentable for the reasons set forth above, claim 17 is likewise patentable.

Applicants respectfully submit that claim 25 is patentable for reasons similar to claim 12.

For the foregoing reasons, Applicants respectfully request that the Examiner withdraw the rejection of claims 12 – 17 and 25.

D. Rejection of Claims 18 – 19 under 35 U.S.C. § 103(a)

Applicants note for the record that Applicants set forth a detailed argument at pages 24 – 25 of the July 30, 2004 response based on analysis of the claims and portions of the Acharya patent relied upon by the Examiner which has been essentially ignored by the Examiner. Instead, the Examiner repeated the previous rejection without providing

any analysis whatsoever regarding why Applicants arguments were either unavailing or incorrect.

Applicants remind the Examiner that when they have provided a good faith and colorable argument overcoming the Examiner's rejection, the burden shifts back to the Examiner to support his rejection with new arguments that are actually set forth *in writing* in the office action.

Applicants nonetheless repeat their arguments set forth in the July 30, 2004 argument in an effort to get the Examiner to actually consider them. Claim 18 recites the following subject matter:

18. A network dispatcher, as in claim 1, further comprising a network use criteria table used by the scheduler to schedule the portions of one or more files.

Claims 18 and 19 were rejected on FIGS. 6 – 7 of the Acharya patent and accompanying text.

Applicants repeat that the problem with this rejection is that tables depicted in FIGS. 6 and 7 of the Acharya patent are not used by a scheduler to schedule transmission of data over a network. Rather, they are simply summary tables that compare the performance of the scheduling algorithms disclosed in the Acharya patent with those of the prior art:

In order to measure the effectiveness of the minimum flow and minimum stretch dispatching algorithms as employed by a central server in a localized scheduling scheme, their performance can be compared to the load balancing algorithm of the prior art. FIG. 6 illustrates the performance of the load balancing (designated as "LdBal"), minimum flow and minimum stretch algorithms as employed by a central server that dispatches job requests to a plurality of local channel servers, wherein the local channel servers employ the MAX scheduling algorithm to schedule the servicing of job requests in their respective queues.

Acharya, Column 9, lines 40 – 50 (emphasis added). The tables depicted in FIGS. 6 and 7 therefore are not used by any scheduling apparatus to schedule data transmission; rather, they depict the performance of various scheduling algorithms in a particular data transmission environment.

The same reasoning similarly applies to claim 19.

Although Applicants appreciate the fact that the Examiner has now gone forward and identified with particularity the basis for combining the Acharya patent with the other references (See page 11, lines 1 – 3 of the December 30, 2004 Office Action), Applicants respectfully submit that this does not change the outcome. Figures 6 and 7 of the Acharya patent are presented for comparison purposes and are not used in scheduling.

Accordingly, Applicants respectfully request that the Examiner withdraw the rejection of claims 18 and 19.

E. Rejection of Claims 20 – 21 under 35 U.S.C. § 103(a)

As discussed previously, Applicants respectfully submit the Sato patent does not disclose logging of data transmission activity over a network, but rather concerns the logging of error as a software program executes. In addition, the Acharya patent does not disclose “a network use criteria table used by the scheduler to schedule the portions of one or more files” as recited in claim 18. Rather, the Acharya patent discloses figures 6 and 7 that compare the performance of data transmission activity using different algorithms, but are in no way used for scheduling data transmission.

Accordingly, claim 20, which recites “a network dispatcher . . . where the network use criteria table has a plurality of records, each record containing a time stamp field and an amount of network use field” is patentable over the cited references. The Acharya patent does not disclose “a network use criteria table” as described and claimed by Applicants. Additionally, the Sato patent does not disclose a logging process for recording the performance of a data transmission process over a network.

In view of the foregoing arguments, Applicants respectfully submit that claim 20, and claim 21 which depends from claim 20, are patentable and the Applicants respectfully request that the Examiner withdraw the rejection of these claims.

F. Rejection of Claims 22 and 24 under 35 U.S.C. § 103(a)

As noted above with respect to several other rejections, the Examiner has essentially ignored Applicants' arguments set forth in the July 30, 2004 response regarding the patentability of claims 22 and 24. Applicants direct the Examiner's attention to pages 26 - 28 and respectfully request that the Examiner actually consider Applicants' arguments this time.

For the convenience of the Examiner, Applicants reproduce the thrust of the arguments here. The Righter patent discloses status LEDs for use in signaling a human user. Claims 22 concern "a status indicator for sending one or more acknowledgements to one or more schedulers indicating one or more of the portions have been entirely transmitted over the network." Claim 22 on its face does not encompass an LED, but rather concerns a computer-implemented status indicator that sends acknowledgements to a computer-implemented scheduling process.

As a result, claim 22 is patentable over the combination cited by the Examiner. Applicants therefore respectfully request that the Examiner withdraw the rejection of claims 22 and 24.

V. Conclusion

The Applicants submit that in light of the foregoing amendments and remarks the application is now in condition for allowance. Applicants therefore respectfully request that the outstanding rejections be withdrawn and that the case be passed to issuance.

Respectfully submitted,

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Date

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